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No. 82-30

In the Supreme Court of the United States

October Term, 1982

MARGE PAYNE, *et al.*,
Petitioners,

vs.

BOBBIE BROOKS, INCORPORATED,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ANDREW J. RUZICHO
Counsel of Record
398 South Grant Avenue
Suite 211
Columbus, Ohio 43215
(614) 221-8620

ALAN M. RAUSS
3830 Kelley Avenue
Cleveland, Ohio 44114
(216) 881-5300

GERALD KUKLAND
3830 Kelley Avenue
Cleveland, Ohio 44114
(216) 881-5300
Attorneys for Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 881-5647

QUESTIONS PRESENTED FOR REVIEW

I. Whether the courts below properly applied the standard this Court established in *McDonnell Douglas v. Green* requiring the filing of an application for employment as an element of a prima facie case in a hiring discrimination lawsuit, and, if so, whether a new exception to that standard should be adopted for these petitioners.

II. Whether the courts below correctly held that the "futility doctrine" exception to the application requirement, as enunciated by this Court in *Teamsters v. United States*, is not applicable to the facts of this case.

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The respondent, Bobbie Brooks, Incorporated, respectfully requests that this Court deny the Petition For Writ of Certiorari to review the order of the Court of Appeals for the Sixth Circuit filed by the petitioners in this case.

OPINIONS BELOW

The Court of Appeals' order is found in petitioner's Appendix, A 58-60. The opinion of the District Court is found at 505 F. Supp. 707 (N.D. Ohio, 1980).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved in this case are Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e *et seq.*, and 42 U.S.C. §1981.

STATEMENT OF THE CASE

The respondent, Bobbie Brooks, Incorporated ("Brooks"), is engaged in the business of manufacturing and selling women's wearing apparel.[1] Petitioners were formerly employed by Brooks at the Brooks facility known as the Kelley Avenue Distribution Center ("Kelley"), a warehouse located on Kelley Avenue in Cleveland's inner city, adjacent to the company's corporate headquarters.

Petitioners were members of the International Ladies' Garment Workers' Union ("ILGWU"), Local 29. The terms and conditions of their employment were set forth in the collective bargaining agreement between Brooks and the ILGWU. The agreement was made up of both a national "master agreement" applicable to all of Brooks' union employees, and a separate "supplemental agreement" which established terms and conditions applicable to a particular facility, such as Kelley.

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1. On January 15, 1982, Brooks filed a petition for reorganization pursuant to Chapter 11 of the United States Bankruptcy Code. It is currently operating its business as debtor-in-possession, pursuant to 11 U.S.C. §1107.

Since 1962, the seniority system established pursuant to the Kelley Supplemental Agreement has provided, inter alia, that whenever Brooks determines that business conditions require a layoff, the worker in the group performing the actual work affected who has been employed for the shortest period of time (plant-wide) is the first to be laid off; recalls are in the inverse order. It has also provided that a laid off employee's right to be recalled continues for only one year after his layoff date. If he has not been recalled within that year he loses all of his benefits under the contract, including his seniority, and his employment is terminated. In addition, employees at one Brooks facility do not gain employment rights at any other facility. There has never been inter-plant bumping at Brooks; a more senior worker at one facility may not bump a less senior employee at a different facility. Throughout these proceedings it has been undisputed that the seniority system employed by Brooks at Kelley is a bona fide seniority system.

Late in 1970, Brooks determined that the expansion of its business and the further growth it was projecting had created an economic need for a second distribution center. After an unsuccessful search for additional space in the Kelley area, Brooks selected a location in Solon, Ohio, a suburb of Cleveland which is approximately 30 miles from Kelley. This second distribution center ("Solon") was opened in the spring of 1971.

Prior to the opening of Solon, in an effort to staff that facility with experienced workers, Brooks offered all of its Kelley employees, including the petitioners, an opportunity to elect to transfer to Solon. In a series of meetings with the Kelley workers, Brooks explained all of the advantages and disadvantages of such a transfer. Only three employees, two white and one black, transferred. None of the petitioners elected to transfer.

Thereafter, Brooks hired new employees to staff Solon. Of the first 26 or 27 employees hired at Solon, six or seven were black, including two black supervisors. The ILGWU placed the Solon workers in its Local 52, and both the company and union treated Solon as a facility separate and distinct from Kelley for all purposes. Separate seniority rosters were maintained for Solon and Kelley employees. Solon employees did not earn any seniority at Kelley, and Kelley employees did not have any seniority rights at Solon. A Solon Supplemental Agreement was executed, analogous to the Kelley Supplemental Agreement. The Solon seniority system contained the same kinds of provisions as the Kelley seniority system with respect to layoff, recall, etc. Its operation was entirely independent of the Kelley seniority system. The Solon system was a bona fide seniority system in its own right.

During the almost five year period from the opening of Solon through the end of 1975, there were no disputes relating to the company's operation of Kelley and Solon as separate facilities. Each of the two distribution centers operated smoothly and independently.

Late in 1974 Brooks began to experience a severe business decline. Net income fell from $109,000 for the year ending April 30, 1974 to a loss of $5,727,000 for the year ending April 30, 1975. As part of its effort to reduce costs, Brooks studied its distribution operations. It found that Solon was much more efficient than Kelley. The cost of shipping, per garment, was more than 32 cents at Kelley as compared with only 22 cents at Solon. This is a substantial difference, as Brooks was then shipping more than 10 million garments per year. The cost of occupancy at Kelley was almost $500,000 per year more than the occupancy cost at Solon. For these and other business reasons, late in 1975 Brooks decided that Kelley should be closed.

Prior to the time it decided to close Kelley, Brooks had already been forced to lay off many of its employees. Substantial layoffs occurred at Kelley, at Solon, and at other facilities around the United States. By August, 1975, sixty-seven Kelley employees, some of whom had been originally laid off in 1974, were on layoff.[2] Facing the completion of one year on layoff, and the contractually mandated termination of employment at that time, a number of these employees asked the union to attempt to obtain severance pay for them.

Beginning in late October, 1975, Brooks and the ILGWU met concerning the laid off Kelley employees. In addition to the union's demand for severance pay, which Brooks had no contractual obligation to pay, the parties also discussed the closing of Kelley. The resolution of these issues was that the 75 Kelley employees then on layoff, including several persons who had already finished one full year on layoff, would be terminated and paid severance pay, as of December 31, 1975.[3] The facility on Kelley Avenue would be closed and the 29 most senior Kelley employees, 15 of whom were black and all of whom were still actively

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2. Approximately thirty of the Kelley employees on layoff worked as temporary workers at Solon for three to six weeks during the September heavy shipping period in 1975. This work, which would normally have been performed by temporary workers obtained through employment agencies, ended when the backlog was alleviated. Two incidents involving a few of the petitioners occurred at Solon during this time. The petitioners attempted to characterize the incidents as "racial." The district court held that "Race was not a factor in these actions at the Solon plant." 505 F. Supp. at 711.

3. In addition to agreeing to pay severance, Brooks agreed to treat the terminations as if they had been caused by the closing of a plant (Kelley), and to cooperate with the former employees and the union in obtaining additional severance benefits from a union supplemental severance fund. These benefits, which were substantial, would not have been available if the terminations were simply the result of the completion of one year on layoff. The benefits were also not available to anyone who was reemployed by his former employer within six months of his termination.

working, would be moved with their work to a new location in Solon.[4] The Kelley unit would be maintained as a separate facility, in accordance with the existing labor agreements and practices. The new location came to be known as the "K Wing." The original Solon facility came to be known as the "S Wing."

The K Wing and S Wing distribution facilities continued to operate independently, just as they had operated before the Kelley Distribution Center was relocated to the K Wing. Local 29 continued to represent the employees in the K Wing and Local 52 continued to represent the employees in the S Wing. Each wing retained its own seniority list. There were no transfers between the K Wing and S Wing; nor were notices of openings in the S Wing posted in the K Wing, or vice versa.

In 1976 and 1977, there was some hiring at the Solon building, although the size of the work force remained essentially unchanged. Throughout this period sixty percent of the new hires were temporary; many working short days and weeks. Brooks often relied on employment agencies to supply these temporary needs. In 1976, not one person was hired in the K Wing.[5] In the S Wing in 1976 a total of fifty people were hired, but a total of sixty-six were terminated. In 1976 and 1977, a total of ninety-eight people were hired at Solon.[6] By stipulation

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4. The new location was in a separate part of the "U" shaped building which housed the original Solon Distribution Center. The original Solon facility was in one prong of the "U" and the new location was in the other prong. In the base of the "U" between the two prongs was another business. Thus, the two wings were physically separated.

5. There was *no turnover* in the K Wing; all of the K Wing employees had worked for Brooks for more than ten years.

6. This number does not include the 26 petitioners who accepted Brooks' offer of reemployment in August and September, 1977, when the company's business began to expand once again. This offer was extended to all of the petitioners. Including the rehired petitioners, 36 of the 122 persons hired at Solon in 1976 and 1977 (29.5%) were black.

the parties agreed that fifteen of these ninety-eight new hires were black. This 15.3% rate of employment of blacks compares favorably with the 15.5% representation of blacks in the work force in the Cleveland Standard Metropolitan Statistical Area ("Cleveland SMSA").

After the termination of their employment with Brooks at the end of 1975, *none* of the petitioners *ever* filed an application for employment at Solon with Brooks. All of the petitioners who testified at trial submitted written applications for employment with other companies subsequent to their termination, but not with Brooks. In addition, all of the petitioners knew, as a result of (i) their own experience in obtaining a job at Brooks; (ii) their knowledge of the company's employment practices, (iii) instructions from the union, and (iv) a letter agreement attached to the 1974 Kelley Supplemental Agreement, that if they wanted to be reemployed by Brooks they must file an application for employment. In fact, several of the petitioners had personally had the previous experience of being employed by Brooks, leaving the company, subsequently filing a new application for employment and then being reemployed.

Throughout the period of time in question, Brooks, like most other employers in the nation, required every applicant for employment to initiate the hiring process by filing a written employment application with the company. This procedure was followed without exception. A person arriving at either Kelley or Solon in search of employment would be given an application form to complete. The application did not contain any racial identification. The completed application would then be placed in a file, in chronological order. When Brooks needed to fill a vacancy the person doing the hiring would review the most current applications and interview applicants.

After the interview the most qualified applicant would be hired. With respect to each of the distribution centers, this procedure was required because Brooks generally needed the new distribution employee within one or two days. It was the company's experience that the most current applicants had indicated a present interest in a job, were available, and were less likely to be working elsewhere. It was not the company's practice to notify former employees of current job openings. As the District Court found, the filing of an application is an essential element of Brooks' hiring procedure. 505 F.2d at 713-714, n. 7.

There was a conflict in the evidence as to whether the union requested employment for the severed Kelley employees during 1976 and 1977. Union witnesses testified that they made such requests, but to no avail. This testimony was directly and positively denied by several company representatives. There is no dispute, however, that these conversations (i) never related to any particular named former employee, and (ii) were never directed toward any specific vacancy. In fact, there was no testimony as to the availability of any particular job at a time when Brooks was allegedly asked to rehire former employees.

It is also undisputed that none of the petitioners ever filed an application for employment at Solon. Some of the reasons the petitioners gave for not applying for jobs at Solon included not being interested in reemployment, preferring to work in downtown Cleveland, and receiving unemployment benefits in excess of the amount that could have been earned at Solon.

The petitioners have alleged that Brooks' hiring practices at Solon were racially discriminatory. These allega-

tions have been made in the face of the facts that in a community (Solon) where less than 1% of the population is black, and in a Standard Metropolitan Statistical Area (Cleveland SMSA) where 15.5% of the work force is black, Brooks has hired:

1. 15% black employees at Solon from the day it opened through January 1, 1976;

2. 15.3% black employees at Solon from January 1, 1976 through December 31, 1977, not including the petitioners who were rehired in 1977;

3. 29.5% black employees at Solon from January 1, 1976 through December 31, 1977, including the rehired petitioners;

4. A large number of temporary workers obtained through employment agencies, the majority of whom were black; and

5. More than 20% black employees at *all* of its facilities in the Cleveland SMSA during each year relevant hereto (1970 through 1977).

The District Court found that the petitioners did not establish a prima facie case of hiring discrimination under *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), that the futility doctrine set forth in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), did not apply to the facts of this case, and that the company's actions were grounded in business necessity, *Griggs v. Duke Power Company*, 401 U.S. 424 (1971).[7] The Court of Appeals for the Sixth Circuit affirmed the decision on April 7, 1982.

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7. In this petition, the petitioners did not appeal the finding below on the issue of business necessity.

REASONS FOR DENYING THE WRIT

I. THE *McDONNELL DOUGLAS* STANDARD FOR PROVING A PRIMA FACIE CASE OF HIRING DISCRIMINATION HAS BEEN PROPERLY APPLIED BY THE COURTS BELOW AND IS NOT IN NEED OF MODIFICATION.

A. The Courts Below Correctly Held, As Have All Other Courts Considering the Question, That *McDonnell Douglas* Requires Proof of the Filing of an Application in a Hiring Discrimination Case.

The petitioners have asked this Court to modify its decision in *McDonnell Douglas v. Green, supra.* In that case, this Court held that in order to make out a prima facie case of hiring discrimination the petitioners must show (i) that they belong to a racial minority, (ii) that they applied for and were qualified for a job for which the employer was seeking applicants, (iii) that despite their qualifications they were rejected, and (iv) that after their rejection, the position remained open and the employer continued to seek applicants. Hundreds, perhaps thousands, of employment discrimination cases have been decided in accordance with *McDonnell Douglas.* This Court has reiterated the *McDonnell Douglas* test for establishing a prima facie case in *Teamsters v. United States, supra; Furnco Construction Corp. v. Waters,* 438 U.S. 567 (1978), *Trustees of Keene State College v. Sweeney,* 439 U.S. 24 (1978), and *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981). Every Circuit Court of Appeals considering the issue has adhered to *McDonnell Douglas,* establishing an unbroken line of authority. *Tagupa v. Board of Directors,* 633 F.2d 1309 (9th Cir.

1980); *Marsh v. Eaton Corp.*, 639 F.2d 328 (6th Cir. 1981); *Alexander v. Aero Lodge No. 735, International Association of Machinists and Aerospace Workers*, 565 F.2d 1364 (6th Cir. 1978); *Taylor v. Mueller Co.*, 660 F.2d 1116 (6th Cir. 1981); *Johnson v. General Tire and Rubber Co.*, 652 F.2d 574 (5th Cir. 1981); *Jewett v. International Telephone and Telegraph Corp.*, 653 F.2d 89 (3rd Cir. 1981); *Omawale v. WBZ*, 610 F.2d 20 (1st Cir. 1979).

It is uncontroverted that not one of the petitioners herein applied for a job at Solon. As a result, they have failed to make out a prima facie case.

In addition to being a well established aspect of the law relating to hiring discrimination cases, the *McDonnell Douglas* application requirement is entirely logical and appropriate. Unless he is presented with an application for a job, an employer does not have an opportunity to either accept or reject the application, for permissible or impermissible reasons. In the absence of proof that the petitioners had applied for a job it would not be appropriate to allow them to assert that they had been unlawfully rejected for such position.

B. There Is No Reason for This Court to Establish an Exception to the Application Requirement.

In an effort to excuse their admitted failure to fulfill the *McDonnell Douglas* application requirement, the petitioners are asking this Court to engraft a new exception to the standard.[8] They assert that, even though they have not actually applied for employment, *former employees*

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8. The only presently recognized exception is the so-called "futility doctrine" which was enunciated by this Court in *Teamsters v. United States*, *supra*. The inapplicability of the futility doctrine to the facts of this case is discussed in Section II of this brief.

should be automatically deemed to have applied for any job opening occurring subsequent to the termination of their employment, and that they should even be deemed to have filed such "applications" at facilities of their former employer at which they had never been employed. They further assert that when a union official, in a general way, asks an employer to rehire a large group of former employees, without naming any particular individual, without knowing whether any individual is available for or interested in reemployment, and without regard to whether the employer had any available jobs at that time, "applications" have been filed by each of the former employees.

There is no reason for this Court to establish such an exception. Nothing contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*, 42 U.S.C. §1981, or any case cited by the petitioners would even suggest that a former employee should be treated differently from any other applicant. Rather, in a hiring discrimination case the inquiry must be, simply stated, whether qualified applicants for a job were denied employment because of their race. The applicants must take some action to indicate to the employer that they possess a present interest in a position. The employer must then react to the action taken by the applicants. This is the way the hiring process actually works, and this reality is adequately reflected in the *McDonnell Douglas* standard. It requires no modification.

C. The Change in the *McDonnell Douglas* Standard Sought by the Petitioners Would Not Change the Outcome of This Case.

The petitioners are asking this Court to modify a well established legal standard when they ask for a new exception to the *McDonnell Douglas* application requirement.

Brooks submits that even if such an exception is created, it would not change the outcome of this case.

Assuming, arguendo, that the Court holds that the petitioners should be deemed to have applied for jobs as a result of the requests for jobs allegedly made by their union representative, the petitioners would have then made out a prima facie case of hiring discrimination. However, as this Court held in *Furnco Construction Corp. v. Waters, supra*, "a prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." The Court went on to say that once a prima facie case has been established, "the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, not an illegitimate one such as race." 438 U.S. at 577. Furthermore, in *Teamsters v. United States*, this Court held that proof of discriminatory motive is essential in a disparate treatment case. 431 U.S. at 335, n. 15.

In this case, the courts below have already explicitly held (i) that the petitioners have not demonstrated that Brooks' policies were racially motivated, and (ii) that these policies, including the company's hiring practices, were justified by business necessity. As a result, even if the petitioners can convince this Court to modify a well established and consistently applied standard as to the need for filing an application in order to establish a prima facie case, the result in this case would remain unchanged.

D. The Issues Raised Are of No National Importance.

The petitioners propose that the application requirement can be met by such things as general comments from

union representatives and inferences of interest in re-employment from the fact that they had been fired and from their requests for references. This standard, if adopted, would allow *these petitioners* to make out a prima facie case. It would be of little importance to anyone else, however. Other people make direct contact with a prospective employer when they are interested in a job. Other people complete employment applications when they know that the employer hires from applications on hand. Other people, in short, initiate the hiring process by applying for a job.

II. THE COURTS BELOW CORRECTLY HELD THAT THE "FUTILITY DOCTRINE" IS NOT APPLICABLE TO THE FACTS OF THIS CASE.

A. In Order to Invoke the Futility Doctrine Petitioners Must Have Proved That They Would Have Applied but for Discrimination and That They Would Have Been Discriminatorily Rejected.

In *Teamsters v. United States, supra*, this Court set forth one exception to the *McDonnell Douglas* application requirement, the so-called "futility doctrine." In *Teamsters*, the Court stated:

> A consistently enforced discrimination policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection. 431 U.S. at 365.

But the Court immediately explained this statement by using as an example an employer who places a "whites only" sign on the hiring office door, and who has a history of providing unequal employment opportunities. The Court stated:

> If an employer should announce his policy of discrimination by a sign reading "whites only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practice - by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of the work force from which he has discriminatorily excluded members of minority groups. 431 U.S. at 365.

The Court went on to say that for nonapplicants to prevail two distinct elements of proof are required. In order to invoke the futility doctrine they must demonstrate (i) that they would have applied but for discrimination, and (ii) that they would have been discriminatorily rejected had they applied. 431 U.S. at 365, n. 52.

B. There Is No Evidence in This Case in Support of Either Element of the Futility Doctrine.

The petitioners did not adduce any evidence as to either of the two elements of the futility doctrine. As to the first element, i.e., that they would have applied but for discrimination, not one petitioner testified that he did not apply because of racial discrimination.[9] What the evidence does demonstrate is that Brooks *did* hire blacks at Solon. At least 15% of the Solon work force was black at all rele-

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9. Several petitioners testified at trial that their reasons for not applying included, "working elsewhere," "unemployment compensation paid better," and "wanted to work downtown." The fact that most of the job vacancies were temporary suggests another reason for failure to apply.

vant times, and as much as 29.5% of the Solon hires in 1976 and 1977 were black, at a facility located in a city with a black population of 1% and in an SMSA with a black work force of 15.5%. These statistics argue against any intent to discriminate. *Furnco Construction Corp. v. Waters, supra.* Clearly, these facts describe an employer who has a history of regularly and consistently employing black workers. They do not describe an employer who places a "whites only" sign on the hiring office door. The petitioners have not proved the facts which are required in order to invoke the futility doctrine.

All petitioners were aware of the necessity of filing an application, and several had the experience of being terminated, reapplying for a job with Brooks at a subsequent time, and being rehired. Several petitioners had applied initially with Brooks on the advice of friends or relatives, and many petitioners told friends or relatives to apply for a job with Brooks, and they were hired. Union officials suggested to some of the petitioners that they reapply at Solon after their terminations at Kelley in December, 1975, but none did.

Brooks submits that there is not one scintilla of evidence in this record that the petitioners would have applied for jobs at Solon but for racial discrimination.

Regarding the other element of the futility doctrine, i.e., proof that the petitioners would have been discriminatorily rejected had they applied, once again there is no evidence in the record to support this allegation. Had the petitioners, or some of them, applied at Solon for temporary vacancies, based upon Brooks' past practices, hiring record, and the petitioners' own past experience with Brooks, it is likely that they would have been rehired. As the district court held, the "futility must be caused by

discrimination, not an apparent lack of jobs," and in this case "there was not the requisite discrimination." 505 F. Supp. at 717.

From the foregoing, it is clear that the petitioners have failed to establish that the futility doctrine is applicable to this case.

CONCLUSION

The petitioners have not set forth any substantial reason for this Court to grant their writ, either under the *McDonnell Douglas v. Green* standard for establishing a prima facie case in hiring, or under the *Teamsters v. United States* standard for establishing the futility doctrine. There are no conflicting decisions on either issue, and there are no compelling reasons for granting the writ. Therefore, the respondent prays that the Court deny the petition for certiorari in this case.

Respectfully submitted,

ANDREW J. RUZICHO
Counsel of Record
398 South Grant Avenue
Suite 211
Columbus, Ohio 43215
(614) 221-8620

ALAN M. RAUSS
3830 Kelley Avenue
Cleveland, Ohio 44114
(216) 881-5300

GERALD KURLAND
3830 Kelley Avenue
Cleveland, Ohio 44114
(216) 881-5300
Attorneys for Respondent